SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.....

B. C. SCHRAM, Receiver of First National Bank-Detroit, a National Banking Association,

Petitioner,

vs.

JOSEPH L. COYNE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

Opinions below have been described in the petition for writ of certiorari under the caption "Opinions Below."

II.

JURISDICTION

The statement as to jurisdiction has heretofore been set forth in the petition for writ of certiorari under the caption "Jurisdiction."

III.

STATEMENT OF THE CASE

The facts have been adequately stated in the petition for writ of certiorari under the caption "Summary Statement."

IV.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the decision of the District Court.

2. The Circuit Court of Appeals erred in not referring to the state courts of Michigan for determination the single question of law involved as to whether the respondent's assumption of the mortgage debt constitutes a liability under a covenant or upon a simple contract.

V.

SUMMARY OF ARGUMENT

A. When a question of local law is raised in the Federal courts, which is undecided by decisions of, and not controlled by statutes of the state wherein the suit is filed, it is the duty of the Federal courts to refer such a problem for determination to the State courts.

B. Under the available Michigan decisions and statutes, an action at law brought to collect a mortgage deficiency from the mortgagor's grantee, who assumed the covenant to pay contained in the mortgage, is barred in ten years and not in six years.

ARGUMENT

A

WHEN A QUESTION OF LOCAL LAW IS RAISED IN THE FEDERAL COURTS, WHICH IS UNDECIDED BY DECISIONS OF, AND NOT CONTROLLED BY STATUTES OF THE STATE WHEREIN THE SUIT IS FILED, IT IS THE DUTY OF THE FEDERAL COURT TO REFER SUCH A PROBLEM FOR DETERMINATION TO THE STATE COURTS.

This is a simple case presenting a single issue of law. The facts were stipulated and are not in dispute. The sole question involved is whether the six or the ten year statute of limitations of Michigan applies to the petitioner's complaint. If the six year statute applies, then the District Court and the Court of Appeals were correct in their decisions dismissing the petitioner's complaint; if the ten year statute applies, the lower courts were in error and the petitioner should recover.

Whether the six year or the ten year statute of limitations applies, rests in turn upon the basic question of whether the liability of the respondent herein sounds in simple contract or in covenant. The Court of Appeals in its decision held in the following language that this basic question was open and undecided by the Michigan courts:

> "Whether acceptance by a grantee of a deed from a mortgagor containing the grantee's assumption of the mortgage, renders the grantee liable to the mortgagee on the covenant or simple contract, is a question that has not been decided by the Michigan courts." (R. 46).

The Court of Appeals in its opinion then considered at length the decisions of the courts of other states bearing upon this point of law. There is concededly a wide split in the authorities bearing thereon. The Court of Appeals chose to follow the courts of those states which have held that the liability of a grantee under circumstances similar to those of the respondent is based upon simple contract and not upon covenant. In so deciding, the Court of Appeals stated:

> "With this latter view, we are in accord persuaded by strength of authority of its support in reason and precedent" (R. 53).

It is the petitioner's contention, as will be set forth in Section B of this brief, that the available Michigan authorities support the petitioner's contention that the respondent's liability sounds in covenant and is governed by the Michigan ten year statute of limitations. Be that as it may, the petitioner contends that if the Court of Appeals reached the conclusion that the point at issue herein had not been decided by the courts of Michigan, it was the duty of the Court of Appeals not to attempt to determine what was the general weight of authority in other states and then follow that weight of authority, but to refer the open point of law for decision to the state courts of Michigan.

A similar situation has twice been before this court recently, in both of which instances, although this court did not question the jurisdiction of the lower Federal Courts over the controversies before them, said courts were ordered to refer the undetermined local issues to the state courts for decision.

The first of these decisions is that of *Thompson v. Magnolia Petroleum Company,* 309 U.S. 478 (1940). A question arose therein as to whether a right of way in Illinois conveyed a fee simple title or a mere easement to the owner thereof. The Seventh Circuit Court of Appeals held that the same conveyed a fee simple title while the Eight Circuit Court of Appeals held that the right of way conveyed an easement. There was no applicable Illinois statute or decision construing the right of way estate in Illinois. This Court, while conceding that the Federal Court had jurisdiction over the dispute before it, remanded the case to the District Court "with instructions to modify its order so as to provide appropriate submission of the question of fee simple ownership of the right of way to the Illinois state court." 309 U.S. 484.

In the next case of *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496 (1941), a suit was brought in the District Court of Texas to enjoin the enforcement of an order of the Railroad Commission of Texas. The Commission based its order upon a Texas statute which statute had not been interpreted by the state courts of Texas. Here again, upon the case ultimately reaching this Court, this Court ordered the cause remanded to the District Court "with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion". 312 U.S. 501.

In reaching this decision, this Court used the following language directly applicable to the within situation:

> "Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our

> independent judgment regarding the application of that law to the present situation. The lower court did deny that the Texas statutes sustained the Commission's assertion of power. And this represents the view of an able and experience circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. **But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination.** The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. **In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication."**

To the same effect, see the very recent decision of this Court in the case of *City of Chicago v. Fieldcrest Dairies, Inc.*, decided April 27, 1942, and reported in 86 Law. Ed. Adv. Op. Page 888, as well as a very recent case from the Sixth Circuit Court of Appeals decided subsequent to the within case, to-wit, *Findley v. Odland,* 127 Fed. (2d) 948 at 953.

The petitioner urges that under the clear mandate of this court, as set forth in the cases cited hereinabove, it was the duty of the Court of Appeals, having decided that there were no controlling Michigan authorities covering the point of law involved herein, to remand the case to the District Court with instructions to submit the issue of law for decision to the state courts of Michigan. Your petitioner, as Receiver of the First National Bank-

Detroit, holds among his assets hundreds of claims similar to that involved herein. Should the state courts of Michigan ultimately decide this issue of local law contrary to that of the Court of Appeals herein, the hopeless confusion in which your petitioner, as well as innumerable other holders of similar claims, would find themselves, is most apparent.

Obvious, too, is the discrimination that would obtain as between persons similarly situated to the respondent herein who were sued in the Federal as opposed to the state courts. Petitioner, therefore, contends that the Court of Appeals erred in not remanding the question of law involved herein for determination in the state courts of Michigan, and that this Court should grant certiorari for so doing.

B

UNDER THE AVAILABLE MICHIGAN DECISIONS AND STATUTES, AN ACTION AT LAW BROUGHT TO COLLECT A MORTGAGE DEFICIENCY FROM THE MORTGAGOR'S GRANTEE, WHO ASSUMED THE COVENANT TO PAY CONTAINED IN THE MORTGAGE, IS BARRED IN TEN YEARS AND NOT IN SIX YEARS.

As above stated, the Court of Appeals held in its opinion that issue of local law involved herein had not been decided by the Michigan courts. The petitioner concedes that this is true, but contends that the available Michigan decisions all point in the direction of the liability of the respondent herein being considered in the nature of covenant, and hence barred by the Michigan ten year statute of limitations.

The merits of this case turn upon the proper construc-

tion of Section 27.605, Mich. Stat. Annot. (C.L. '29, Sec. 13976), which reads in material part as follows:

> "All actions in any of the courts of this state shall be commenced within six (6) years next after the causes of action shall accrue, and not afterward, except as hereinafter specified: *Provided, however,*
>
> "1. That actions founded upon judgments or decrees rendered in any court of record of the United States, or of this state, or of some other of the United States, and actions founded upon bonds of public officers, **actions founded upon covenants in deeds and mortgages of real estate may be brought within ten (10) years from the time of the rendition of such judgment, or the time when the cause of action accrued on such bond or covenants; . . .** "

As recently described by the Supreme Court of Michigan in the case of *Guardian Depositors Corporation v. Powers,* 296 Mich. 553, 296 N.W. 675 (1941): "A debtor, holding a real estate mortgage as security, in the event of non-payment of the debt, may have recourse to any one of four remedies:

"1. An action at law on the note.

"2. An action at law on the covenant in the mortgage. *Guardian Depositors Corp. v. Savage,* 287 Mich. 193.

"3. A foreclosure in equity with the right to a deficiency judgment in the amount fixed by the court's decree. 3 Comp. Laws 1929, Sec. 14364, Stat. Ann. Sec. 27.1132 et seq.

"4. Foreclosure by advertisement as was had in the instant case under the provisions of 3 Comp. Laws 1929, Sec. 14425, Stat. Ann. Sec. 27.1221 et seq., with a sub-

sequent right to an action for deficiency. *New York Life Ins. Co. v. Erb*, 276 Mich. 610." (296 Mich. 553, 560, 296 N.W. 675, 678.)

In the last few years there has been a series of decisions of the Supreme Court of Michigan all relating to the mortgage deficiency problem, which petitioner shall briefly consider and which have a direct bearing on the issues presented herein.

In *Guardian Depositors Corporation v. Savage*, 287 Mich. 193, 283 N.W. 26 (1938), the Supreme Court of Michigan held that the mortgagee could bring an action against the mortgagor on the covenants contained in the mortgage and recover a decree for the deficiency remaining after the application of the proceeds obtained through a chancery sale of the mortgaged property, and that such an action was governed by the ten year period of limitation.

In the case of *Guardian Depositors Corporation v. Hebb*, 290 Mich. 427, 287 N.W. 796 (1939), the Supreme Court extended the same doctrine to cover deficiencies occurring after foreclosure by advertisement proceedings and a sale under the power of sale contained in the mortgage. Here, too, the ten year statute of limitations was declared applicable to actions at law based upon the covenant to pay contained in the mortgage.

In *Guardian Depositors Corporation v. Brown*, 290 Mich. 433, 287 N.W. 798 (1939), the Court still further extended the rights of a mortgagee to collect a deficiency, this time by permitting a recovery in an action at law brought against a grantee who had assumed and agreed to pay the mortgage. While the right of a mortgagee as against a grantee to recover a deficiency decree in a

chancery proceeding had heretofore been recognized in Michigan, the *Brown case,* supra, recognized the same in an action at law by virtue of the operation of a new Michigan statute known as Act No. 296 Public Acts of 1937. See App. p. 19.

Finally, there is the decision of *Guardian Depositors Corporation v. Powers,* supra, in which the Supreme Court of Michigan recognized the four methods of recovery on behalf of the mortgagee, and which case, it is important to note, was in itself an action against an assuming grantee.

It is thus apparent that the Supreme Court of Michigan, among other remedies, has clearly recognized the right of a mortgagee to maintain an action for the collection of a deficiency based upon the covenant to pay contained in the mortgage, and this applies equally to both mortgagor and assuming grantee.

Perhaps the landmark case in Michigan relative to the liability of a grantee who assumes and agrees to pay a mortgage debt is *Crawford v. Edwards,* 33 Mich. 354 (1876). In this case, as in the instant suit, the mortgagor conveyed the mortgaged premises to the grantee by a deed containing a clause wherein the latter assumed and agreed to pay the mortgage debt and assumed the covenants in the mortgage. The Court in that case said:

> "The acceptance of such a deed binds the grantee as effectually as though the deed had been *inter partes* and had been executed by both grantor and grantee." (33 Mich. 354, 358.)

Further quoting with approval from a decision in another jurisdiction, the Supreme Court of Michigan said in *Crawford v. Edwards*:

> " 'The plain intent of the deed was to put the purchaser in the place of the vendor . . . , the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage as fully as if he himself had covenanted to pay it off. And either the vendor or mortgagee might, upon that contract, have compelled him to pay it off:' " (33 Mich. 354, 359-360.)

In Michigan, as elsewhere, ". . . no particular form of words is necessary for the creation of a covenant in a deed," *Vincent v. Crane*, 134 Mich. 700, 97 N.W. 34 (1903); "no particular form of phraseology is essential to constitute a covenant," *Mulligan v. Haggerty*, 296 Mich. 62, 295 N.W. 560 (1941).

It is true that Coyne did not sign or seal the deed which contains the mortgage assumption covenant, but the deed-poll containing the covenant was accepted by him, and the authorities hold that the acceptance of a deed-poll containing a covenant is the equivalent of formal execution:

> "As a general rule a grantee's acceptance of a deed containing a covenant on his part is equivalent to an agreement by him to perform the covenant." (21 C.J.S. *Covenants*, Sec. 8, p. 887.)

It is further significant to note that the Michigan statute of limitations (Sec. 13976 C.L. '29), supra, is different than the statutes found in many other states. The ten year provision, which petitioner contends is applicable herein, does not speak of covenants under

seal, but of "actions founded upon covenants in deeds and mortgages of real estate***." It seems clear that the within action is assuredly based upon the assumption of a covenant to pay contained in the mortgage and hence is an action founded upon covenant.

Petitioner, therefore, contends that it is apparent from this brief resume of the available Michigan decisions bearing upon the point at issue that in all probability the Michigan courts would decide that the respondent's liability herein sounded in covenant and not in simple contract. Added to this is also the fact that in petitioner's opinion the great weight of authority in other jurisdictions supports the views expressed herein. The numerous decisions of other Courts are set forth in the opinion of the Court of Appeals, and we shall not burden the Court with a repetition thereof herein (R. 46-47).

It is, therefore, respectfully submitted that the Writ of Certiorari should be granted.

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